85-1121

No. 85-_____

Supreme Court, U.S.
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# In the Supreme Court of the United States

**October Term, 1985**

RICHARD A. PLEHN, INC., and RICHARD A. PLEHN,

*Petitioners,*

*v.*

IMPERIAL BANCORP and IMPERIAL BANK,

*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit failed to follow the rule enunciated in *Huddleston v. Dwyer*, 322 U.S. 232 (1944), that, in a diversity action, federal courts must apply state law in accordance with the most recent decision of the highest state court until the case is no longer *sub judice*.

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## PETITION FOR WRIT OF CERTIORARI

### OPINIONS BELOW

The memorandum of decision of the United States Court of Appeals for the Ninth Circuit (App. A) is not officially reported. Similarly the memorandum of decision of the United States District Court granting summary judgment (App. B) is not officially reported.

## JURISDICTION

The memorandum of the Court of Appeals was filed on April 2, 1985. The Order of the Court of Appeals denying a petition for rehearing (App. C) was filed on October 1, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## RELEVANT STATUTORY PROVISIONS

California Business & Professions Code §10136 provides:

> No person engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this State shall bring or maintain any action in the courts of this State for the collection of compensation for the performance of any of the acts mentioned in this article without alleging and proving that he was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose.

## STATEMENT OF THE CASE

Petitioners Richard A. Plehn, an individual ("Plehn"), and Richard A. Plehn, Inc., a New York corporation ("Plehn, Inc."), commenced an action against respondents Imperial Bancorp and Imperial Bank (collectively "Imperial"), to recover a percentage commission for obtaining a real estate loan commitment. Plehn is a licensed California real estate broker. Plehn, Inc. is a New York corporation based in New York which holds a valid New York broker's license. Plehn, Inc. is owned entirely by Plehn and was joined as a co-plaintiff because it advanced Plehn's expenses and was to act as his collection agent.

Petitioners allege in their complaint that they entered into an oral contract with Imperial pursuant to which they were to procure a lender and joint venture partner for development of a commercial office building in downtown Los Angeles. Petitioners further allege that they duly performed their obligations under this contract and that Imperial was therefore obligated to pay them a commission equal to one percent of the construction loan funds committed by the joint venture partner ($610,000). Imperial failed and refused to pay any amount whatsoever to petitioners under this agreement. Petitioners allege causes of action for breach of oral contract, quantum meruit, and fraud and seek recovery of $610,000 in compensatory and $1,800,000 in punitive damages. Jurisdiction in the District Court was based upon diversity of citizenship pursuant to 28 U.S.C. §1332(a)(1).

After discovery and pretrial proceedings were completed, Imperial brought a motion for summary judgment in which it argued that neither Plehn nor Plehn, Inc. could maintain suit to recover the commission because Plehn, Inc. was not separately licensed as a real estate broker in California—even though Plehn himself was so licensed. The District Court granted Imperial's motion and the Court of Appeals affirmed.

On March 11, 1985, approximately three weeks before the Court of Appeals issued its memorandum of decision affirming the entry of summary judgment, the California Supreme Court decided *Asdourian v. Araj*, 38 Cal. 3d 276, 696 P. 2d 95, 211 Cal. Rptr. 703 (1985). *Asdourian* controls the key issue on appeal, namely whether under California's doctrine of "substantial compliance" petitioners are entitled to recover for their services notwithstanding their lack of literal compliance with California's real estate licensing statute. The Supreme

Court decision expressly "disapproved" earlier case authority relied upon extensively by Imperial, and completely contradicts the reasoning employed by the Ninth Circuit in affirming the District Court's summary judgment. Petitioners filed a timely petition for rehearing, based on this precedent.

Shortly after the petition for rehearing was filed, the California Supreme Court decided *Tenzer v. Superscope,* 39 Cal. 3d 18, 702 P. 2d 212, 216 Cal. Rptr. 130 (1985), which further invalidated the Ninth Circuit's decision. In *Tenzer,* the California Supreme Court vacated the Court of Appeal's published decision below, which the Ninth Circuit cited and relied upon in affirming the entry of summary judgment. By letter dated August 16, 1985, petitioners brought *Tenzer* to the attention of the Ninth Circuit. Notwithstanding the effect of *Asdourian* and *Tenzer* on the Ninth Circuit's reasoning the petition for rehearing was denied without explanation.

As demonstrated below, the Ninth Circuit's affirmance of the District Court's summary judgment egregiously conflicts with the most recent precedent of the California Supreme Court. Petitioners respectfully submit that this Court should exercise its supervisory power over the Court of Appeals for the Ninth Circuit, directing that Court to reconsider its earlier decision in this case and to apply the rules of law announced in the controlling cases of *Asdourian* and *Tenzer.*

## REASONS FOR GRANTING PETITION

### 1. The Ninth Circuit's Complete Disregard of Controlling California Law Requires this Court to Exercise its Supervisory Power.

Central to federal diversity jurisdiction is the principle that state law controls the substantive rights of the parties. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938). This Court granted certiorari in *Huddleston v. Dwyer,* 322 U.S. 232 (1944), to enforce the application of this principle under factual circumstances identical to those presented here. In *Huddleston*, the Court of Appeals for the Tenth Circuit affirmed a judgment of the District Court of Oklahoma in a diversity action concluding that the District Court had correctly interpreted and applied then controlling Oklahoma law. Two petitions for rehearing were filed in the Tenth Circuit, the latter of which brought to the attention of the Court a newly issued opinion of the Supreme Court of Oklahoma which was dispositive of the issues on appeal. The Tenth Circuit denied both petitions.

The Supreme Court held that the Tenth Circuit was obligated to consider the recent precedent of Oklahoma's highest court stating:

> State law is the controlling rule of decision in this case as to both substantive and procedural rights of the parties. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487; Federal Rules of Civil Procedure, rules 69(a), 81(b), 28 U.S.C. following § 723c . . . . It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls the decision. *Meredith v. Winter Haven,* 320 U.S. 228, 64

> S.Ct. 7. And a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones. "Until such time as the case is no longer sub judice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decisions of the highest state court." *Vandenbark v. Owens-Illinois Co.*, 311 U.S. 538, 543, 61 S.Ct. 347, 350 85 L.Ed. 327.

*Id.* at 236.

The Supreme Court vacated the judgment below and remanded the case to the Tenth Circuit Court of Appeals instructing it to reconsider its decision in light of the recent opinion of the Oklahoma Supreme Court. *Id.* at 238.

Petitioners seek the same remedy by this petition. The Court of Appeals for the Ninth Circuit disregarded the rules of law announced by the California Supreme Court in *Asdourian v. Araj* and *Tenzer v. Superscope* decided while this case was *sub judice*. As this Court did in *Huddleston*, it should instruct the Ninth Circuit to consider and apply these recent California Supreme Court decisions.[1]

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[1]To grant the relief sought by petitioners this Court is not required to devote substantial time and attention to the underlying issues in this matter. Petitioners submit that if certiorari is granted, this Court may take summary action without receiving additional briefs or hearing oral argument as was practiced in *United States v. Indrelunas*, 411 U.S. 216, 218 (1973). ("Consideration of the petition for certiorari and the response has led us to conclude that further briefs and oral arguments would not materially assist in

### 2. The Ninth Circuit's Reasoning Affirming the Entry of Summary Judgment Diametrically Conflicts with Controlling California Law.

Under California law a licensing statute "should not be so literally construed as to require exact compliance if it would transform the statute into an unwarranted shield for the avoidance of a just obligation." *In re Estate of Baldwin,* 34 Cal. App. 3d 596, 605, 110 Cal. Rptr. 189 (1973). Where strict application of a licensing statute would otherwise preclude a person from recovering for the fruits of his labor, the doctrine of "substantial compliance" permits recovery in appropriate circumstances. *Asdourian v. Araj,* 38 Cal. 3d 276 (1985). Under this doctrine, the lack of literal compliance with a licensing statute will not defeat an action for recovery of professional services where "the party seeking to escape his obligation has received the full protection which the statute contemplates." *Latipac, Inc. v. Superior Court,* 64 Cal. 2d 278, 411 P. 2d 564, 49 Cal. Rptr. 676 (1966). As shown below, the Ninth Circuit's analysis of the substantial compliance issue in this case is clearly erroneous in light of the California Supreme Court's decision in *Asdourian v. Araj.*

Richard Plehn is a licensed California real estate broker. Plehn wholly owns and controls Plehn, Inc., a corporation which is licensed as a real estate broker in New York but not in California. Early in this litigation, Plehn stated in connection with an issue not relevant here that he "co-brokered the transaction as an individual, along with Plehn, Inc., - New York."[2] Based

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our disposition of the case and, for the reasons hereafter stated, we grant certiorari and reverse the judgment of the Court of Appeals.")

[2]Plehn's February 25, 1983 declaration which contains this averment was submitted by petitioners in opposition to a motion

upon this averment Imperial ultimately brought a motion for summary judgment on the ground that neither Plehn nor Plehn, Inc. could maintain suit for recovery of their brokerage commission due to the operation of California Business and Professions Code §10136[3] since the transaction involved two parties one of whom was unlicensed. Imperial relied principally upon the cases of *General Insurance Company v. Superior Court*, 26 Cal. App. 3d 176, 102 Cal. Rptr. 541 (1972) disapproved in *Asdourian v. Araj*, 38 Cal. 3d 276 (1985) and *Estate of Prieto*, 243 Cal. App. 2d 79, 52 Cal. Rptr. 80 (1966) which are discussed below.

To distinguish the authorities cited by Imperial and demonstrate that the doctrine of substantial compliance was applicable, Plehn stated in a declaration, submitted in opposition to Imperial's summary judgment motion, that notwithstanding the technical posture of the transaction (i.e., "co-brokered" by Plehn and Plehn, Inc.), as a *practical* matter he was the only natural person

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to dismiss brought by Imperial. In its motion, which was denied, Imperial challenged the District Court's diversity jurisdiction on the ground that Plehn, Inc. was a California corporation. In his declaration Plehn discredited Imperial's arguments by showing that he had two separate corporations, one in California and one in New York, and that only the latter was a party to this transaction. Nowhere in this declaration did Plehn address who was physically performing the brokerage services for Imperial, a key factor with respect to the issue of substantial compliance. (See discussion of *Asdourian v. Araj, infra*, at pp. 14-18.)

[3]California Business & Professions Code §10136 provides:

> No person engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this State shall bring or maintain any action in the courts of this State for the collection of compensation for the performance of any of the acts mentioned in this article without alleging and proving that he was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose.

who was expending time and energy to find a lender for Imperial's real estate project. The relevant portion of this declaration, dated February 24, 1984, provides:

> My co-plaintiff New York corporation was created to provide a separate entity for employment, record keeping, accounting, pension planning and taxation purposes, and to add a veneer of substance and perpetuity to the activities of an individual. All dealings between plaintiffs and defendants in issue here were between defendants and myself. The oral contract arose out of conversation between Mr. Eltinge and myself; the only personal services rendered for defendants' benefit were my own; and all representations made to plaintiffs in connection with the transaction were made to me. I elected to name the corporation as co-plaintiff because in the transaction with defendants, as in most joint venture transactions, it advanced my expenses and acted as my collection agent. It rendered my statement for services accordingly. In no sense did the corporation render different or separate services to defendants.[4]

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[4]The District Court's decision granting Imperial's motion for summary judgment rested entirely on the Court's rejection of this declaration. The District Court concluded that statements in the declaration conflicted with previous averments made by Plehn and therefore disregarded them as "sham" under the holding in *Radobenko v. Automated Equipment Corporation*, 520 F. 2d 540 (9th Cir. 1975). Petitioners devoted almost half of their opening brief in the Court of Appeals to the argument that Plehn had never contradicted himself and therefore that this key declaration should have been considered by the District Court. The Court of Appeals agreed with petitioners' arguments on this particular issue. As the Court stated in its memorandum:

> The [district] court relied upon *Radobenko v. Auto-*

Under *Schantz v. Ellsworth*, 19 Cal. App. 3d 289, 96 Cal. Rptr. 783 (1971) and *In re Estate of Baldwin*, 34 Cal. App. 3d 596, 110 Cal. Rptr. 189 (1973), California decisions existing at the time Imperial's motion for summary judgment was heard in the District Court, the foregoing facts supported application of the doctrine of substantial compliance. In *Schantz v. Ellsworth*, the Court of Appeal held that a licensed real estate broker was not precluded from maintaining an action to recover a brokerage commission under Business and Professions Code §10136 even though he was not licensed to conduct business under the fictitious name in which he performed the brokerage services. The Court reasoned:

> The purpose of the licensing requirement is to protect the public from the perils incident to dealing with incompetent or untrustworthy real estate practitioners. [Citations omitted.] The statutory purpose, insuring the competency and trustworthiness of real estate practitioners, is satisfied by proof of plaintiff's valid real estate broker's license. It was in connection with the application for and issuance of that license that

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*mated Equipment Corp.*, 520 F.2d 540, 544 (9th Cir. 1975), to reject an affidavit filed in opposition to defendant's motion for summary judgment. It did so because the affidavit contradicted Plehn's earlier testimony in the case. While we disagree with the reliance upon *Radobenko* in resolving the factual dispute we find that of no consequence since it is not disputed on appeal that Richard A. Plehn, Inc. and Richard A. Plehn individually *co-brokered* the transaction.

Court of Appeals Memorandum (App. A, p. A2). In light of the grounds upon which the Ninth Circuit affirmed the summary judgment it must be assumed that the facts set forth in Plehn's February 14, 1984 declaration are material. Therefore, it is unnecessary for petitioners to reiterate their arguments demonstrating that Plehn has never contradicted himself.

> his competency and trustworthiness were examined. [Citations omitted.] Under the statutory scheme, licenses for branch offices and for the use of fictitious names appear to be granted routinely to one who already holds a valid real estate broker's license without further proof of competency or trustworthiness.

*Id.* at 293.

In *Estate of Baldwin,* the California Court of Appeal applied the rationale of *Schantz v. Ellsworth* in holding that a licensed real estate broker ("Lembi") who performed real estate services through an unlicensed corporation ("Skyline Realty, Inc.") could recover a brokerage commission in spite of Business and Professions Code §10136. Lembi, acting through Skyline Realty, Inc., provided brokerage services in connection with the probate sale of an apartment complex. Certain parties challenged the right of either Lembi or Skyline Realty, Inc. to any portion of the commission on the sale. They argued that the brokerage agreement between Skyline Realty, Inc., and the executors of the estate was void because the corporation was unlicensed.

The court rejected this contention finding the reasoning of *Schantz v. Ellsworth,* to be "particularly appealing here." *Baldwin,* 34 Cal. App. 3d at 605. The Court observed that Lembi was licensed, and further noted that the probate court had expressly found "that the services were performed by Lembi individually" and impliedly found "that Lembi was merely doing business under a fictitious name." *Id.* It therefore upheld the commission award.

In this case, petitioners argued on appeal that *Schantz v. Ellsworth* and *In re Estate of Baldwin* controlled the

licensing issue and required reversal of the District Court's summary judgment. These decisions recognize that the issue of substantial compliance turns on whether the statutory purpose of California's real estate licensing law is satisfied. Petitioners urged that the statutory purpose of "protecting the public from the perils incident to dealing with incompetent or untrustworthy brokers" (*Baldwin*, 34 Cal. App. 3d at 605) was entirely satisfied here because: (1) Plehn had a valid California real estate broker's license; (2) Plehn was the only natural person performing services for Imperial under the commission agreement; and (3) no different services were provided by Plehn, Inc. than those provided by Plehn himself.

Petitioners argued that the circumstances of this case were exactly like those of *Schantz* and *Baldwin* where the unlicensed entities could have obtained licenses "without further proof of competency or trustworthiness." *Schantz*, 19 Cal. App. 3d at 293. Petitioners pointed out that under California's licensing law, Plehn, Inc. could have become a licensed broker upon the payment of a $165 fee and the filing of certain *pro forma* documents with the California Department of Real Estate. California's statutory licensing scheme provides for the routine issuance of a corporate license based upon a license already issued to a corporate officer. The Department of Real Estate conducts no additional inquiry into the qualifications of the corporation to act as a real estate broker. 10 California Administrative Code, Real Estate Commission §§2740, 2742 (App. D).

The Ninth Circuit failed to apply the doctrine of substantial compliance on what can best be considered a purely superficial analysis of the facts. The Court stated:

> Plehn relies upon *In re Estate of Baldwin*, 34 Cal. App. 3d 596, 110 Cal. Rptr. 189, 194 (1973)

> to permit recovery since Plehn individually was a licensed real estate broker in the state of California. We reject his reading of *Estate of Baldwin*. The *Baldwin* decision was based upon the trial court's factual finding that all of the brokerage services were performed by the individual and that the individual "was merely doing business under a fictitious name." 110 Cal. Rptr. at 194. In the present case substantial brokerage services were performed by Richard Plehn, Inc., which did not have a California real estate license. Because the transaction was co-brokered by an unlicensed broker, neither plaintiff can recover. See *Prieto*, 243 Cal. App. 79 [sic].

Court of Appeals Memorandum, p. A2. (App. A)

As the foregoing quotation reveals, the Ninth Circuit seized on Plehn's statement that he acted as a "co-broker" with Plehn, Inc. without considering the practical circumstances of the transaction (discussed by Plehn in his 1984 declaration). The Ninth Circuit stated conclusorily that Plehn, Inc. was performing "substantial brokerage services," without specifically identifying those services. Had the Court attempted to do so it would have been forced to recognize that under the uncontroverted facts of this case the services provided by Plehn, Inc. were exactly the same as the services provided by Plehn himself.

In affirming the District Court's summary judgment, the Ninth Circuit ignored the rationale of *Baldwin* and *Schantz*. In *Baldwin*, the California Court of Appeal could easily have concluded that the doctrine of substantial compliance was inapplicable under the defective reasoning applied here by the Ninth Circuit.

The *Baldwin* court observed that the unlicensed corporation, Skyline Realty, Inc., was the contracting party named in the relevant brokerage documents and thus could have concluded that Skyline Realty, Inc. was performing "substantial brokerage services." Under the Ninth Circuit's reasoning recovery would have been denied. Instead, the *Baldwin* court looked beyond the mere form of the transaction and examined it substantively. The *Baldwin* court took note of the trial court's express finding that "it was through the efforts and by agreement with Mr. Lembi that the [transaction was consummated]." *Id.* at 602. It thus found that the purpose of the licensing statute was satisfied even though, as a matter of form, the services were rendered by the unlicensed corporation.

If any doubt as to the applicability of the substantial compliance doctrine existed in this case under *Baldwin* and *Schantz*, it was laid to rest by the California Supreme Court's decision in *Asdourian v. Araj*, 38 Cal. 3d 276 (1985). *Asdourian*, upon which Plehn's petition for rehearing was based, confirms that the Ninth Circuit's analysis of the substantial compliance issue is erroneous. In *Asdourian* the Supreme Court reaffirmed with force and clarity the rule that lack of literal compliance with a licensing statute will not preclude a party from recovering for services rendered where the legislative purpose of the licensing statute is satisfied. *Asdourian* firmly establishes that Plehn's statement that he "co-brokered" the transaction with Plehn, Inc. is utterly irrelevant with respect to the issue of substantial compliance.

The plaintiff in *Asdourian*, a contractor, performed extensive construction work for the defendant. The plaintiff had obtained a contractor's license in the name

of his business "Artko Remodeling and Construction," but had failed to obtain a license in his own name. The defendant refused to pay for these services arguing that the plaintiff, who had used his own name in the transaction, was not licensed as a contractor under the contractor licensing law (Business & Professions Code §7031) and therefore could not bring suit to recover for his work.

The Supreme Court held that plaintiff could recover for his services under the doctrine of substantial compliance. The Court applied three analytical criteria developed in *Latipac v. Superior Court,* 64 Cal. 2d 278, 411 P.2d 564, 49 Cal. Rptr. 676 (1960), to determine whether the doctrine was applicable namely: "(1) [whether] plaintiff held a valid license at the time of contracting, (2) [whether] plaintiff readily secured a renewal of that license, and (3) [whether] the responsibility and competence of plaintiff's managing officer were officially confirmed throughout the period of performance of the contract." *Asdourian,* 38 Cal. 3d at 284 quoting *Latipac,* 64 Cal. 2d at pp. 281-282.

Under the approach to the issue of substantial compliance mandated by the Supreme Court in *Asdourian,* the legal conclusions of the Ninth Circuit in this case are patently invalid. Application of the *Latipac* factors here reveals that petitioners may invoke the doctrine of substantial compliance.

The first *Latipac* factor is clearly satisfied in this case. Plehn held a valid California real estate brokers license at the time of contracting and indisputably was the *only person* who performed the service of finding a mortgage lender for Imperial's real estate project. As the Court ruled in *Asdourian,* the fact that Plehn, Inc. lacked a separate license in its own name "did not prevent defendant [Imperial] from receiving the full and effective protection of the statute." 38 Cal. 3d at 285.

As in *Asdourian*, the second *Latipac* factor, license renewal, is not relevant here since there was no period during which Plehn himself was not licensed. *Id.*

The third and final *Latipac* factor, "which requires official confirmation of the responsibility and competence of plaintiff's managing officer throughout the period of performance of the contract" (*id.* at 286; quoting *Latipac*, 64 Cal. 2d at p. 282), is clearly satisfied. The Court's discussion of this factor in *Asdourian* is equally applicable in this case:

> Here, the competence and experience of plaintiff Asdourian formed the basis of the license issued to Artko. "(A)ny matters which might form the basis of legitimate inquiry by the licensing board in determining the fitness of [Asdourian] to enjoy a license were 'necessarily considered' and resolved in connection with the issuance of the license to [Artko]." [Citations omitted.]
>
> Issuance of a license to Asdourian in his own name would not have provided defendant with any greater assurances that he was dealing with an experienced and competent contractor. Nor would it have provided any different information concerning the status of solvency of plaintiff's business. The business entity was precisely the same as that to which the license has been issued. The work would have been performed by the same employees, and supervised by the same person. Defendant would have obtained no better protection, and no different performance, had he contracted with Artko.

*Asdourian*, 38 Cal. 3d at 286.

As evidenced by this language, it is beyond doubt that the California Supreme Court endorses the position petitioners have repeatedly asserted in this case: the fact that Plehn held a valid license and was the *only person* who performed services under the agreement with Imperial warrants application of the substantial compliance doctrine. To use the Court's own words: "[i]ssuance of a license to . . . [Plehn, Inc.] would not have provided defendant[s] with any greater assurances that [they were dealing with an experienced and competent [broker] . . . . The work would have been performed by the same employee, and supervised by the same person." *Id.* Clearly the California Supreme Court would apply the substantial compliance doctrine in this case.

The decision principally relied upon by Imperial, *General Insurance Co. v. Superior Court*, 26 Cal. App. 3d 176, 102 Cal. Rptr. 541 (1972), was disapproved in *Asdourian*. In *General Insurance* the Court of Appeal declined to apply the doctrine of substantial compliance to permit a licensed contractor acting through his unlicensed corporation to recover for work performed. Imperial relied entirely on *General Insurance* to distinguish *Estate of Baldwin*, arguing that in *General Insurance* a licensed individual was rendering services on behalf of an unlicensed corporation, whereas in *Baldwin* the services were rendered on behalf of the individual and "the corporation *was a mere dba or fictitious name for the individual.*" [Appellees' Brief in the Court of Appeal, p. 17 (emphasis by Imperial).]

Petitioners dispute that Skyline Realty Inc. was anything other than a full fledged corporate entity.[5] In

[5]The *Baldwin* opinion refers to the following testimony introduced in the trial court: "the California Corporations Commissioner indicates that there is a California corporation by the name of Skyline Realty, Inc.." 34 Cal. App. 3d at 601.

any event, even if this distinction between *Baldwin* and the present case did exist, it would have no significance. Although the Supreme Court in *Asdourian* recognized that the unlicensed entity in *General Insurance* was a corporation which had "entered into a contract . . . and completed performance," it nevertheless disapproved the holding of the case. *Asdourian,* 38 Cal. 3d at 287. The Supreme Court stated that the *General Insurance* court had improperly relied on the dissent in *Latipac* when it should have followed "the clear rule announced by the majority." *Id.* As the Court stated:

> It has now been almost *five* decades since the doctrine [of substantial compliance] was first applied. The Legislature has manifested no disapproval. In the limited and extraordinary circumstances in which it is applied, the policies underlying the doctrine remain compelling. . . . To the extent that *General Insurance, supra,* 26 Cal. App. 3d 176 rests on the logic of the *Latipac* dissent, it is disapproved.

*Asdourian,* 38 Cal. 3d at 287-288. Thus the Supreme Court expressly provided that the doctrine of substantial compliance was not foreclosed in *General Insurance* merely because the unlicensed entity was a corporation.

Moreover, the *Latipac* test for substantial compliance is specifically tailored for factual circumstances involving an unlicensed corporation bringing suit to recover for services. The third factor of the *Latipac* test "requires official confirmation of 'the responsibility and competence of plaintiff's *managing officer* . . . throughout the period of performance of the contract.' " *Asdourian,* 211 Cal. Rptr. at 709, quoting *Latipac,* 64 Cal. 2d at p. 282 (empahsis added). Unquestionably the term

"managing officer" pertains to a corporation, not a mere fictitious business name or sole proprietorship. If the Supreme Court in *Asdourian* had meant to preclude application of the doctrine of substantial compliance in cases involving unlicensed corporations, it would *not* have expressly quoted this language from *Latipac*.[6]

Petitioners submit that the California Supreme Court's decision on the licensing issue in *Asdourian* diametrically conflicts with the analysis of the Ninth Circuit in this case. The Ninth Circuit's memorandum of decision instantly reveals that the Court did not consider whether the purpose of California's real estate broker licensing law was satisfied in this case. Rather, the Court denied recovery under the rule of *Estate of Prieto*, 243 Cal. App. 2d 79, 52 Cal. Rptr. 80 (1966), simply because Plehn stated that he "co-brokered" the transaction with his wholly owned corporation, Plehn, Inc. *Estate of Prieto* does not support the Circuit Court's decision in this matter.

In *Estate of Prieto* two separate and *unrelated* parties "were *associated in a joint effort* to effect a lease." *Estate of Prieto*, 243 Cal. App. 2d at 86 (emphasis added). The record contained "no evidence that either of them was a licensed real estate broker during the time in question." *Id.* at 83. It "affirmatively appear[ed]" that one of the parties "was an attorney-at-law and not a

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[6]See also *Knapp Development & Design v. Pal-Mal Properties, Ltd.*, ___ Cal. App. 3d ___, 219 Cal. Rptr. 44 (1985). (Applying *Asdourian v. Araj*, the California Court of Appeal recently held that an unlicensed corporate contractor could maintain an action to foreclose on a mechanics lien where the president and principal shareholder of the corporation held a valid license during the relevant time period.)

licensed real estate broker." *Id.* Under these facts the court understandably denied recovery. The "competence and responsibility" of the attorney to act as a real estate broker had never been confirmed. Therefore, even if the attorney's partner in the transaction ("Dunlevie Associates") held a real estate license (which was not disclosed by the record), it was not apparent that the client received the full protection the licensing statute contemplated. The license of Dunlevie Associates, if it did exist, had no bearing whatosever on the attorney's capabilities as a real estate broker. Unlike the facts of *Asdourian, Baldwin, Schantz* and the case now before this Court, the attorney in *Estate of Prieto* would have been required to take the real estate brokers examination to obtain a valid brokers license.

The Ninth Circuit's conclusion that the rule of *Estate of Prieto* bars application of the doctrine of substantial compliance in this case is erroneous. The issue of substantial compliance was not even addressed in *Estate of Prieto*. Conversely, the substantial compliance doctrine was analyzed extensively and held applicable in *Asdourian, Baldwin* and *Schantz*. These cases would have reached the same result even if the plaintiffs had stated that they acted *jointly* (i.e., "co-brokered") with their unlicensed business entities. The Ninth Circuit ignored the substantive policy concerns of the California legislature and focused only on the form of the transaction. This approach is wholly inconsistent with California law. Petitioners were thus denied fair hearing and disposition of their claims in the Ninth Circuit in derogation of their fundamental right to due process of law guaranteed by the Fifth Amendment. Only this Court can now make a fair hearing possible by remand to the Ninth Circuit with instructions to apply the controlling California precedent discussed herein.

### 3. The Ninth Circuit Relied on Authority Which Was Vacated While the Petition For Rehearing Was Pending.

The legal basis for the Ninth Circuit's determination that petitioners cannot recover on their claim for fraud is also invalid. The Ninth Circuit cited *Tenzer v. Superscope, Inc.*, 148 Cal. App. 3d 430, 195 Cal. Rptr. 881 (1983) vacated 39 Cal. 3d 18, 216 Cal. Rptr. 130 (1985), for the proposition that "[a] broker may not recover in quantum meruit or on account of fraud when the failure to fulfill a statutory requirement has made recovery under the brokerage contract impossible." Court of Appeals Memorandum, p. A3. The California Court of Appeals' decision in *Tenzer* was vacated by the Supreme Court in *Tenzer v. Superscope, Inc.*, 39 Cal. 3d 18, 216 Cal. Rptr. 130 (1985), decided after petitioners filed their petition for rehearing but *before* it had been acted upon. Petitioners brought the Supreme Court's decision in *Tenzer* to the Ninth Circuit's attention by letter dated August 16, 1985. Under *Tenzer* it is now clear that summary judgment should not have been entered on petitioners' fraud claim.

In *Tenzer* plaintiff brought an action for breach of contract, unjust enrichment and fraud alleging that he was entitled to a real estate commission under an oral agreement to find a purchaser for the defendant's property. The trial court granted defendant's motion for summary judgment on the ground that all of the plaintiff's claims were barred by the statute of frauds. The Court of Appeal affirmed. The Supreme Court reversed, concluding, with respect to the contract and unjust enrichment claims, that plaintiff "had alleged facts sufficient to invoke the estoppel doctrine and thus foreclose Superscope [the defendant] from relying upon the statute of frauds as a defense." *Id.* at 27.

The Supreme Court further held that an action for fraud can be maintained even where the allegedly fraudulent promise is unenforceable as a contract due to the statute of frauds. The Court disapproved the holding to the contrary in *Kroger v. Baur,* 46 Cal. App. 2d 801, 117 P.2d 50 (1941), in which the Court of Appeal stated that maintenance of a fraud claim where an oral contract is unenforceable would nullify the purpose of the statute of frauds. The Court reasoned that recovery in tort for fraud requires more than proof of the elements of a claim for breach of contract:

> Rather, "something more than nonperformance is required to prove the defendant's intent not to perform his promise." (*People v. Ashley* (1954) 42 Cal. 2d 246, 263, 267 P.2d 271; *see also Jacobson v. Mead,* (1936) 12 Cal. App. 2d 75, 82, 55 P.2d 285; *Justheim Petroleum Company v. Hammond* (10th Cir. 1955) 227 F.2d 629, 637; Rest.2d Torts, § 530, com. d.; Prosser, Torts (5th ed. 1984) § 109, p. 764.) To be sure, fraudulent intent must often be established by circumstantial evidence. Prosser, for example, cites cases in which fraudulent intent has been inferred from such circumstances as defendant's insolvency, his hasty repudiation of the promise, his failure even to attempt performance, or his continued assurances after it was clear he would not perform. (Prosser, supra, at pp. 764-765.) However, if plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an oral promise, he will never reach a jury. The policies of the statute of frauds will not be subverted by affording plaintiffs

> who can prove actual fraud the opportunity to do so.

*Id.* at 30-31.

*Tenzer* confirms that petitioners can recover in fraud regardless of whether they are precluded from recovering their commission under their oral brokerage contract. To recover on their claim for fraud petitioners would be required to prove that Imperial induced them to render valuable services without intending to pay them compensation. *Lesperance v. North American Aviation,* 217 Cal. App. 2d 336, 345, 31 Cal. Rptr. 873 (1963). Petitioners' recovery on this theory would not defeat the purpose of the real estate licensing statute. *Tenzer,* 39 Cal. 3d at 30. The Ninth Circuit's ruling to the contrary was based on invalid authority and is clearly erroneous.

## CONCLUSION

This Court should grant the petition for a writ of certiorari and, by summary disposition, remand this action to the Ninth Circuit instructing that Court to consider and apply the legal principles enunciated in *Asdourian v. Araj,* and *Tenzer v. Superscope.*

Respectfully submitted,

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# APPENDIX

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

APR -2 1985

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

RICHARD A. PLEHN, INC., and RICHARD A. PLEHN,

Plaintiffs/Appellants,

v.

IMPERIAL BANCORP, and IMPERIAL BANK,

Defendants/Appellees.

CA No. 84-5905

DC No. CV 83-678-RJK (Gx)

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Robert J. Kelleher, District Judge, Presiding

Argued and submitted February 6, 1985

Before: SCHROEDER, FLETCHER, and FARRIS, Circuit Judges.

California Business and Professions Code § 10136 prohibits maintenance of a suit for collection of a real estate commission by Richard A. Plehn, Inc. and Richard A. Plehn, individually as co-brokers, because Richard A. Plehn, Inc. was not a licensed California real estate broker. *In re Estate of Prieto,* 243 Cal. App. 2d 79, 52 Cal. Rptr. 80, 83 (1966).

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by 9th Cir. R. 21 for dispostition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter,* and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

The district court's holding that Richard A. Plehn, Inc. co-brokered the transaction at issue was based upon sworn statements made by Plehn. The court relied upon *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 544 (9th Cir. 1975), to reject an affidavit filed in opposition to defendants' motion for summary judgment. It did so because the affidavit contradicted Plehn's earlier testimony in the case. While we disagree with the reliance upon *Radobenko* in resolving this factual dispute, we find that of no consequence since it is not disputed on appeal that Richard A. Plehn, Inc. and Richard A. Plehn individually *co-brokered* the transaction.

Plehn relies upon *In re Estate of Baldwin*, 34 Cal. App. 3d 596, 110 Cal. Rptr. 189, 194 (1973), to permit recovery since Plehn individually was a licensed real estate broker in the state of California. We reject his reading of *Estate of Baldwin*. The *Baldwin* decision was based upon the trial court's factual finding that all of the brokerage services were performed by the individual and that the individual "was merely doing business under a fictitious name." 110 Cal. Rptr. at 194. In the present case, substantial brokerage services were performed by Richard Plehn, Inc., which did not have a California real estate license. Because the transaction was co-brokered by an unlicensed broker, neither plaintiff can recover. *See Prieto*, 243 Cal. App. 79.

The district court properly held that the finder's exception to the California licensing requirement did not apply. The exception does not apply "[i]f the broker takes any part in the negotiations, no matter how slight," *Rees v. Department of Real Estate*, 76 Cal. App. 3d 286, 295, 142 Cal. Rptr. 789, 795 (1977). It is not disputed that Plehn participated in the financing negotiations.

We also uphold the trial court's denial of recovery under theories of quantum meruit and fraud. A broker may not recover in quantum meruit or on account of fraud when the failure to fulfill a statutory requirement has made recovery under the brokerage contract impossible. *Tenzer v. Superscope, Inc.*, 148 Cal. App. 3d 430, 195 Cal. Rptr. 881 (1983). Under California law, legislatively-imposed requirements on real estate transactions cannot be circumvented by a recasting of the cause of action. *Id.* at 886-87; *see also Keely v. Price*, 27 Cal. App. 3d 209, 103 Cal. Rptr. 531, 535 (1972).

AFFIRMED.

**APPENDIX B**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
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CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICHARD A. PLEHN, INC., a New York corporation; and RICHARD A. PLEHN,

Plaintiffs,

v.

IMPERIAL BANCORP, a California corporation; and IMPERIAL BANK, a California corporation,

Defendants.

No. CV 83-0678-RJK (Gx)

MEMORANDUM OF DECISION AND ORDER

The Court presently has before it defendants' motion for summary judgment. The motion came on for hearing on March 5, 1984 and was taken under submission. Having read and carefully considered the moving papers and the opposition filed in response thereto, and having heard oral argument, the Court grants defendants' motion for summary judgment.

Plaintiff Richard Plehn was issued a broker's license by the California Department of Real Estate on November 11, 1980 and was at all times thereafter a real estate broker licensed by the State of California. Plaintiff Richard Plehn, Inc. is a New York corporation. Richard Plehn, Inc. has never obtained a valid California broker's license. Richard Plehn is the president, treasurer and sole stockholder of Richard Plehn, Inc.

Defendants Imperial Bancorp and Imperial Bank are California corporations with headquarters in Los Angeles, California. On June 28, 1983, defendants

acquired a 99-year lease on a parcel of real property located in Los Angeles, and thereafter entered into a contract to purchase the site in fee.

Plaintiffs claim that they made an oral brokerage agreement with defendants in Los Angeles in September or October, 1980 whereby plaintiffs undertook to provide financing for a building project contemplated by the defendants and Metropolitan Life Insurance Company on the parcel of real property in exchange for a commission. The plaintiffs concede that any agreement made with defendants in connection with the proposed joint venture and mortgage loan financing was made by Richard Plehn and Richard Plehn, Inc. jointly.

In connection with the proposed transaction between defendants and Metropolitan Life Insurance Company, plaintiffs participated in meetings between defendants and Metropolitan and participated in negotiating the terms of the proposed financing agreement.

Both the individual and corporate plaintiff have brought suit to recover commissions allegedly due from defendants as a result of the oral brokerage agreement. There is no dispute that the individual plaintiff is a licensed broker. There is also no dispute that the corporate plaintiff is not a licensed broker in the State of California.

Cal. Bus. & Prof. Code Section 10136 provides that no person acting as a broker can maintain an action for the collection of any compensation earned as a result without being licensed. A corporation is deemed to be a "person" for purposes of section 10136. *See In re Estate of Baldwin*, 34 Cal. App. 3d 596, 604, 110 Cal. Rptr. 189, 194 (1973). Thus, since Richard Plehn, Inc. is not licensed broker, it cannot maintain an action for the commissions allegedly due from defendants.

California, however, does not require a "finder" to be licensed to recover commissions for helping parties find each other. *Tenzer v. Superscope, Inc.*, 148 Cal. App. 3d 430, 440, 195 Cal. Rptr. 881, 886 (1983). In *Tyrone v. Kelly*, 9 Cal. 3d 1, 8, 11-12, 507 P.2d 65, 68, 106 Cal. Rptr. 761, 765 (1973), the court held that the test of whether a person is a broker or a finder is whether the person merely brings the parties together or also goes further and helps to conclude the transaction and negotiates to compromise any differences between the parties. If the person goes beyond merely introducing the parties, no matter how insignificant the further action, the person is deemed to be a broker and must be licensed to recover any compensation or commissions. *Id.* at 8, 507 P.2d at 68.

In this case, the plaintiffs did much more than bring the parties together; they negotiated and helped to compromise the differences between the defendants and the financier of the project, Metropolitan. By plaintiffs' own admissions in answers to interrogatories, the plaintiffs were "active participants in the many meetings between Metropolitan Life Insurance Company and the defendants" and "assisted in negotiating the terms of such joint venture." Thus, the Court concludes that the plaintiffs did more than merely help the parties find each other; they acted as brokers and must be licensed to recover. *Tyrone*, 9 Cal. 3d at 11-12, 507 P.2d at 68.

In opposition to the defendants' motion, the plaintiffs argue that the corporate plaintiff was nothing more than a shell; a corporation set up for tax, pension and accounting purposes. As such, plaintiffs argue that Richard Plehn rendered all of the services in his individual capacity, thus making the corporate plaintiff an unlicensed finder. Plaintiffs have submitted a

declaration of Richard Plehn wherein he avers that at all times he was acting in his individual capacity, making it Richard Plehn the individual who conducted all of the negotiations between Metropolitan and defendants. However, in deposition testimony in late 1983, Richard Plehn averred that the corporation did *not* render any services separate from those tendered by the individual plaintiff. Moreover, Richard Plehn averred that "Richard A. Plehn, Inc. did all the work" and that "it [Richard Plehn, Inc.] did it all in its offices in New York." Richard Plehn is trying to create a triable issue of fact as to which capacity he was acting in when he conducted the negotiations, thereby making summary judgment for defendants inappropriate. A party opposing a motion for summary judgment cannot create a triable issue of fact, however, merely by contradicting earlier sworn deposition testimony. *Radobenko v. Automated Equipment Corporation,* 520 F.2d 540, 544 (9th Cir. 1975).

The Court notes that the distinction of which capacity Richard Plehn was acting in is crucial to the plaintiffs' lawsuit. If Richard Plehn was acting in his individual capacity, then the corporate plaintiff could reasonably be deemed to be a mere finder. If, on the other hand, he was acting on behalf of the corporation, the corporation was acting not as a finder but as a broker and must be licensed to recover any commissions. *See* Cal. Bus. & Prof. Code Section 10136 This Court finds that under *Radobenko*, Richard Plehn is bound to his initial deposition testimony that he was acting on behalf of, and jointly with, the corporation.

This Court finds that the corporation, acting through Richard Plehn, its president and sole shareholder, participated in negotiations and attempted to compro-

mise the parties. The corporation cannot be deemed to be a mere finder but was acting as a broker. Accordingly, the unlicensed corporate plaintiff cannot recover any of the commissions sought and defendants are entitled to summary judgment against Richard A. Plehn, Inc.

Defendants next contend that if one party to a brokerage agreement, here the corporation, is not licensed and cannot recover, then co-broker Richard Plehn also cannot recover. In *In re Guardianship of Estate of Prieto,* 243 Cal. App. 2d 79, 52 Cal. Rptr. 80 (1966), the court found that a licensed co-broker could not recover commissions under a brokerage agreement because the other broker was not licensed. The court stated:

> An agreement employing a person to act as a real estate broker who is not licensed as such is illegal, void and unenforceable. The assumed services in effecting the subject lease *being the product of the joint effort of both respondents,* the illegality attendant upon Therieau's participation because he was not a licensed broker, *invalidates the whole transaction, and forecloses recovery by either of them* [including the licensed co-broker].

243 Cal. App. 2d at 86, 52 Cal. Rptr. at 84 (emphasis added). Though the plaintiffs now claim that the services were not rendered by both the corporation and the individual but rather by the individual only, plaintiff Richard Plehn earlier claimed that he was acting on behalf of the corporation. As noted, plaintiffs are bound by the deposition testimony of Richard Plehn to the effect that he rendered services on behalf of, and with, the corporation. *Radobenko v. Automated Equipment Corporation,* 520 F.2d at 544. Thus, contrary to the

assertions of plaintiffs, the services were the "joint effort of both" plaintiffs, *Estate of Prieto,* 243 Cal. App. 2d at 86, 52 Cal. Rptr. at 84, and neither is entitled to recover commissions from defendants.

Plaintiffs rely heavily on the case of *Schantz v. Ellsworth,* 19 Cal. App. 3d 289, 96 Cal. Rptr. 783 (1971), in support of their contention that even if the corporate plaintiff cannot recover for commissions, the individual plaintiff still can. In *Schantz,* the court found that a licensed individual, doing business under a fictitious business name, could recover commissions even though the business entity was not licensed. The court noted that Cal. Bus. & Prof. Code Section 10136 was unclear as to whether an individual, already licensed, doing business under an unlicensed fictitious business name, was prohibited from recovering commissions. The court concluded that the individual broker had already proved his trustworthiness and competence and once this was proved, a license to the fictitious entity was "routinely granted." *Id.* at 293, 96 Cal. Rptr. at 785. Thus, the concern of the statute in allowing recovery for commissions only for trustworthy and competent persons was satisfied as a result of the individual being licensed, and the issuance of a license to the corporation would in no way further trustworthiness or competence. *Id. See also Estate of Baldwin,* 34 Cal. App. 3d 596, 606, 110 Cal. Rptr. 189, 194 (1973) (purposes of statute are satisifed when individual doing business under fictitious business entity is licensed even though business entity is not).

The plaintiffs basically rely on the rationale and holding of *Schantz,* arguing that they substantially complied with the requirements of the statute as did the plaintiff in *Schantz.* However, in *Schantz,* the court made the specific finding that the individual broker there

had rendered the services and there was absolutely no indication that the business entity had rendered any of the brokerage services. In this case, however, the plaintiff individual acted on behalf of the corporation and for himself. Thus, this case falls squarely within the holding in *Estate of Prieto,* 243 Cal. App. 2d 79, 52 Cal. Rptr. 80.

Defendants argue that section 10136 is considered to be analogous to Bus. & Prof. Code Section 7031. Section 7031 provides for the licensing of contractors and prohibits any recovery for unlicensed contractors. In *General Insurance Company v. Superior Court,* 26 Cal. App. 3d 176, 102 Cal. Rptr. 541 (1972), the court considered an identical factual situation involving the contractor's licensing statute. There, a suit was filed for recovery of sums allegedly due to an unlicensed corporate contractor. The plaintiff admitted that the corporation was unlicensed.

In language virtually identical to section 10136, section 7031 prohibits an unlicensed person from bringing or maintaining an action for recovery of compensation for performance of acts for which a contractor's license was required. Regardless of section 7031, the plaintiff argued that though the corporation could not recover, the individual should be able to because the purpose of the statute would still be satisifed. The court noted that "applied literally, the language of Section 7031 would preclude plaintiff from maintaining the action," *id.* at 179, 102 Cal. Rptr. at 543, and then considered the plaintiff's claim that he had substantially complied with the contractor licensing requirements. The court concluded:

> Section 7031 represents a legislative determination that the importance of deterring unli-

> censed persons from engaging in the contracting business outweighs any harshness between the parties and that such deterrence can be realized by denying violators the right to maintain any action for compensation in the courts of the state.

*Id.* at 183, 102 Cal. Rptr. at 546. The court then applied this principle holding that the individual licensed plaintiff could not recover even though he had substantially complied with the licensing statute. The court rejected the argument that the court could under considerations of equity, award the plaintiff compensation regardless of Section 7031. *Id.*

In *Schantz*, 19 Cal. App. 3d at 293, 96 Cal. Rptr. at 785, the court noted the similarities in purpose and effect between sections 10136 and 7031. Defendants argue that the *General Insurance* case forecloses application of plaintiff's substantial compliance theory in brokerage license cases also. In *Estate of Baldwin*, 34 Cal. App. 3d 596, 110 Cal. Rptr. 189 (1973), decided after *General Insurance*, the court discussed *General Insurance*, saying:

> Notwithstanding the integrity of [*General Insurance*] as applied to corporate *contractors*, the argument ignores the probate court's express finding that the services were performed by Lembi individually and its implied finding that Lembi was merely doing business under a fictitious name.

*Id.* at 605, 110 Cal. Rptr. at 194. Thus, contrary to the assertions of defendants, *General Insurance* does not automatically foreclose plaintiffs' substantial compliance argument in brokerage licensing cases.

In *Estate of Baldwin,* the licensed individual and the unlicensed corporate plaintiff brough suit to recover brokerage commissions. The corporate plaintiff was foreclosed from recovering commissions under section 10136. 34 Cal. App. 3d at 604, 110 Cal. Rptr. at 194. The court then discussed both the *Schantz* and *General Insurance* cases. The court rejected the holding in *General Insurance*, however, only because it "ignore[d] the . . . court's express finding that the services were performed by Lembi individually and that Lembi was merely doing business under a fictitious name." *Id.* at 605, 110 Cal. Rptr. at 194. In *Schantz* and *Baldwin,* the court allowed recovery to a licensed broker regardless of the unlicensed corporate broker where *the individual* rendered the services but conducted those services under a fictitious business entity. *See Schantz,* 19 Cal. App. 3d at 290-91, 96 Cal. Rptr. 784; *Baldwin,* 34 Cal. App. 3d at 603-06, 100 Cal. Rptr. at 194-95.

In this case, however, Richard Plehn, Inc. rendered services to defendants. Here, by plaintiffs' own admissions, Richard Plehn was not rendering services under the name Richard A. Plehn, Inc.; Richard A. Plehn, Inc. *was rendering brokerage services* through Richard Plehn. Thus, this case falls squarely within the holding of *Estate of Prieto,* 243 Cal. App. 2d 79, 52 Cal. Rptr. 80. Both plaintiffs are foreclosed from recovering commissions allegedly due from defendants.

Finally, the plaintiffs assert causes of action for quantum meruit and fraud. It is clearly established in California that a broker cannot recover in quantum meruit or fraud when a statutory requirement has not been fulfilled making recovery under the brokerage contract impossible. *See Tenzer v. Superscope, Inc.,* 148 Cal. App. 3d 430, 195 Cal. Rptr. 881 (1983) (holding

that a broker could not recover in quantum meruit after brokerage contract was unenforceable due to failure to satisfy statute of frauds). Any other result would allow a contractor to recover the commission under a quantum meruit theory even though unlicensed in clear violation of section 10136. A similar analysis applies to the fraud cause of action. If plaintiff is allowed to sue for damages for fraudulent representation, the purpose of Section 10136 would be completely undermined.

Plaintiffs claim, however, they can allege a cause of action for quantum meruit and fraud without establishing the validity of the brokerage agreement. This exact argument has been rejected by the California courts. *See Tenzer,* 148 Cal. App. 3d at 440-41, 196 Cal. Rptr. at 886-87. As in *Tenzer,* the plaintiffs here can only establish the fraudulent promises and the right to recover in quantum meruit by reference to and reliance on the brokerage agreement which this Court has found to be unenforceable. Thus, plaintiffs are precluded from both bringing the quantum meruit and fraud claims.

The Court concludes that each of plaintiffs' causes of action cannot be maintained by the plaintiffs, and thus the defendants are entitled to summary judgment. Judgment shall be entered accordingly.

The Clerk shall send, by United States mail, a copy of this Memorandum of Decision and Order to counsel for the parties.

DATED: April 26, 1984.

Robert J. Kelleher

ROBERT J. KELLEHER

Senior District Judge

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**APPENDIX C**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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CLERK, U.S. COURT OF APPEALS

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| RICHARD A. PLEHN, INC., and RICHARD A. PLEHN<br>Plaintiffs/Appellants,<br>v.<br>IMPERIAL BANCORP, and IMPERIAL BANK,<br>Defendants/Appellees. | CA No. 84-5905<br>DC No. CV 83-678-RJK (Gx)<br>**ORDER** |

Before: SCHROEDER, FLETCHER, and FARRIS, Circuit Judges.

The answer to the petition for rehearing and reply to the answer heretofore lodged with the court are ordered filed.

The petition for rehearing is denied.

PETTIT & MARTIN

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## APPENDIX D

The following provisions appear in Title 10 California Administrative Code, Real Estate Commissioner, Article 6. "Corporate Licenses:"

**2740. Broker Officers and Salespersons.**

Acts for which a real estate license is required may be conducted in the name of a corporation licensed as a real estate broker only by officers of the corporation licensed under Section 10158 or 10211 or by salespersons employed by the corporation and supervised by an officer licensed under Section 10158 or 10211. No acts for which a real estate license is required may be performed for, or in the name of, a corporation when there is no officer of the corporation licensed under Section 10158 or 10211.

**2742. Certificate of Status, Qualifications or Good Standing.**

(a) An applicant for an original broker license for a domestic corporation shall submit with the application, a Certificate of Status (Domestic Corporation) executed by the California Secretary of State not earlier than 30 days before the date of mailing or delivering the application to the headquarters office of the Department.

(b) An applicant for an original broker license for a foreign corporation shall submit with the application, a Certificate of Qualification or a Certificate of Good Standing (Foreign Corporation) executed by the California Secretary of State not earlier than 30 days before the date of mailing or delivering the application to the headquarters office of the Department.

NOTE: Authority cited: Section 10080, Business and Professions Code. Reference: Sections 10158 and 10211, Business and Professions Code.

**PROOF OF SERVICE BY MAIL**

*State of California*

*ss.*

*County of Los Angeles*

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on December 30, 1985, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
*(Original and forty copies)*

Richards, Watson, Dreyfuss
& Gershon
Glenn Watson, Esq.
333 S. Hope Street
38th Floor
Los Angeles, California 90071

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 30, 1985, at Los Angeles, California.

Joy Rivelli Miller
*(Original signed)*